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SHEELA CHRISTINA NAIR v. REGENCY SPECIALIST HOSPITAL SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[SUIT NO: 23NCVC-5-02-2015]
16 JUNE 2016

B

TORT: *Negligence – Medical negligence – Quantum of damages – Patient suffered severe complications after surgery performed by surgeon – Whether medical expenses paid by insurer ought to be recovered by patient – Whether patient incurred out of*
C *pocket expenses – Civil Law Act 1956, s. 28A(1)*

TORT: *Negligence – Medical negligence – Quantum of damages – Patient suffered severe complications after surgery performed by surgeon – Claim for medical expenses – Whether patient justified in having sought treatment at hospital in another country – Whether particular medical treatment not available at local hospital –*
D *Whether patient only entitled to one third of out of pocket expenses*

DAMAGES: *Special damages – Quantum of – Medical negligence – Plaintiff suffered severe complications after surgery performed by surgeon – Whether travelling expenses a form of special damages – Whether reasonably incurred – Whether plaintiff entitled to claim for costs of extra nourishing supplements, medical supplies*
E *and care by family members – Whether documents furnished to substantiate claims*

DAMAGES: *Negligence – Medical negligence – Quantum of damages – Patient suffered severe complications after surgery performed by surgeon – Loss of income – Whether patient unable to work for 12 months post surgery – Claim for future medical treatment – Likelihood or risk of patient requiring surgical and non-surgical*
F *medical treatment – Weight of medical evidence showed patient likely to have future surgeries – Whether reasonable and fair amount awarded*

DAMAGES: *General damages – Pain and suffering – Physical injuries and deprivation of amenities of life – Whether lump sum award appropriate*

G ***CIVIL PROCEDURE:*** *Costs – Claim for – Legal fees incurred by patient in obtaining court order for discovery of medical records – Whether originating summons involved surgeon as party – Whether decision to release medical records vested with surgeon – Whether claim allowed*

H The plaintiff sought treatment at Regency Specialist Hospital, which was owned and run by the first defendant, and was admitted for a surgical procedure for adhesiolysis and myomectomy to remove her fibroids. The surgery was performed on the same day by the second defendant, a Consultant Obstetrician and Gynaecologist practising in Regency Hospital. Whilst successful in removing her fibroids, the surgery resulted in the
I plaintiff suffering injuries. The laparotomy operation performed by the second defendant caused perforation of the plaintiff's small intestines. The plaintiff experienced abdominal pain and exhibited signs and symptoms of

sepsis as a result. The plaintiff was then transferred to KPJ Puteri Specialist Hospital ('Puteri Hospital') but as her condition worsened, and following a delayed diagnosis of perforation, the plaintiff was subsequently transferred to National University Hospital Singapore ('NUH Singapore'). In view of the complications, the plaintiff had to undergo a resuscitation and stabilisation procedure followed by an emergency laparotomy. Thereafter, the plaintiff had to attend numerous follow up consultations at NUH Singapore and had to take efforts to rehabilitate herself at home. The plaintiff thus had to endure a prolonged period of recovery from the serious injuries she suffered as a result of the negligence of the second defendant at the first defendant hospital. The plaintiff claimed medical negligence. The second defendant admitted liability on the very day the trial commenced. Hence, this was a trial on an assessment of damages. The issues that arose were, *inter alia* (i) whether the medical expenses paid by the insurer ought to be recovered by the plaintiff; (ii) whether the plaintiff was justified in having sought treatment at a hospital in Singapore, and whether the amount incurred was reasonable; (iii) whether travelling expenses was a form of special damages and reasonably incurred; (iv) whether the plaintiff was entitled to loss of income of earnings; (v) whether the plaintiff was entitled to claim for costs of extra nourishing food and supplements, medical supplies and care by family members; (vi) whether the plaintiff was entitled to claim for costs of obtaining a court order for discovery of medical records; (vii) whether the plaintiff could claim for general damages for pain and suffering; and (viii) whether the plaintiff could claim for future medical expenses for non-surgical treatment and surgical treatment.

Held (ordering accordingly):

(1) Section 28A(1) of the Civil Law Act 1956 does not apply to a claim for medical expenses incurred whilst undergoing treatment at the hospital as the claimant would be considered not to have suffered any out of pocket expenses which instead was borne by the insurance company. Since medical expenses claims are under the law in the nature of special damages, it must therefore be established that the claimant incurred out of pocket expenses. Since those parts of the plaintiff's medical bills were paid by the insurer, the extent of such settlement by the insurer did not amount to 'out of pocket expenses' for the plaintiff. This was not incurred or expended by the plaintiff and therefore was not a loss to her. The principle of compensatory damages in the law of torts applicable in this country today is that a plaintiff cannot recover more than that he has lost, for otherwise it would unjustly enrich the plaintiff. Accordingly, the payments made by the plaintiff's insurer in respect of parts of the medical bills issued by Regency Hospital and Puteri Hospital, totalling RM47,292.84 was not recoverable. The total allowed by this court for medical expenses in Malaysia as supported by documentary evidence was therefore RM11,657.51. (paras 22-24)

(2) The plaintiff had not proven that the transfer to NUH Singapore from Puteri Hospital was justified or reasonable. Although Puteri Hospital only diagnosed bowel perforation 25 hours after the plaintiff's admission, it could not be said that the particular treatment was not available or that it was grossly inadequate, not least since a laparotomy operation was in fact then scheduled for the plaintiff. Nor could it be said that the decision of Puteri Hospital to have the surgery done the morning after tantamount to the treatment being unavailable within a reasonable period *vis-a-vis* the urgency of the plaintiff's condition. As such, the plaintiff was to be awarded one third of the out of pocket medical expenses incurred at NUH Singapore which must similarly be after deducting the portion paid by the relevant insurance company. Thus, an award of RM49,162.23 was sufficient. (paras 29-31)

(3) The visits by family members of the plaintiff to the three hospitals to provide the necessary care and support during the prolonged period of hospitalisation were directly a consequence of the negligence of the second defendant. The plaintiff had successfully proven her claim even in the absence of documentary evidence for each and every travel given the nature of travelling expenses as there were instances where the said family members travelled on their own transportation and it would be farfetched to expect them to issue receipts themselves. Accordingly, the plaintiff's claim for travelling costs of her family members related to their visits to provide support and care for the plaintiff was allowed. (paras 32-34)

(4) The plaintiff pleaded that she had lost some of her earnings from working at Truwater Resources, from giving personal tuition and all of her income from teaching at Erican Language Centre. The plaintiff was undertaking a partnership business, and her evidence was supported by her business partner and further corroborated by the income statement from July 2013 to December 2013 which stated the salary of RM3,000 was paid to plaintiff. The plaintiff had proven her case for loss of earnings at Truwater Resources for a total amount of RM43,750. However, the plaintiff's testimony on giving private tuition was not supported by any witness especially in relation to any of the parents of the said eight students nor was there any documentary evidence to substantiate it. The plaintiff had not proven her case to claim loss of income as a personal tutor. As for loss of income from the Erican Language Centre, the plaintiff had furnished documents to prove that she had been paid by the said Centre. The second defendant conceded that the plaintiff could not have worked for 12 months post-surgery, and thus agreed to an amount of RM10,920 on the basis of an earnings of RM910 monthly for a period of 12 months post-surgery. (paras 34-37 & 42-44)

(5) There was no medical evidence that the plaintiff required to purchase Chinese herbal soup and vitamins or that these items proved to be extra nourishing in the first place. Neither had the plaintiff shown any document to evidence the purchase or even to provide a breakdown in respect of the costs of each of such items. Thus, it had not been shown that the claim for costs of extra nourishing food and supplements was reasonably incurred. The plaintiff, however, produced the relevant receipts for the rental of VAC equipment to extract pus from the wound and other disposable items such as alcohol swabs and saline. The claim was thus reasonably incurred and sufficiently proven. The claim for cost of medical supplies, equipment and appliance for the the amount of RM1,717.74 was allowed. Further, the second defendant conceded that the plaintiff required such care and support from her family and agreed to the pleaded amount of RM12,810. However, the plaintiff was unable to prove that she required extra care and given the absence of medical evidence, this court did not allow the award of RM2,075 being claimed by the plaintiff for the cost of professional nursing care. (paras 50-58)

(6) As the Regency Hospital did not provide the plaintiff with her medical records, the plaintiff had to institute an originating summons to obtain discovery for which she incurred legal fees which was now being claimed against the second defendant. However, the originating summons for discovery instituted by the plaintiff did not involve the second defendant as a party. The second defendant had responded to the plaintiff's request by stating his lack of authority to decide on the matter. It had not been shown that in the set up of a private hospital such as Regency Hospital, its legal and contractual relationship with its specialists who are invariably independent contractors, includes the arrangement that any decision to release medical records vests with the latter. Thus, the award for cost of obtaining the court order for discovery of medical records of the plaintiff was not proven and was not allowed. (paras 61-64)

(7) The plaintiff had not sufficiently made out a case that the award of general damages for pain and suffering be awarded individually, not least due to the absence of any case law authority to justify the same. It was more appropriate in the instant case for a lump sum award be given in order to avoid possible overlaps amongst the various categories of pain and suffering. Considering the physical injuries suffered by the plaintiff, and the pain and suffering as well as the deprivation of the amenities of life resulting therefore as well as from the scars, which continue till presently, including mental distress, a lump sum award of RM240,000 was a reasonable and fair amount. (paras 65-71)

(8) None of the experts could specify the number of times the plaintiff may require medical treatment in the future. This court was however satisfied that the plaintiff had established on a balance of probabilities

A that the likelihood or risk of the plaintiff requiring non-surgical medical treatment was substantial and it was, as such, reasonable to state that the plaintiff would require non-surgical admission once every four years. Accordingly, the sum of RM24,500 was awarded in respect of future non-surgical medical treatment. Further, given the condition of the
B plaintiff and the weight of medical evidence on the balance of probabilities that the likelihood of three future surgeries in the plaintiff's lifetime to be significant, the award of RM52,500 was found to be a reasonable and fair sum in respect of costs for future surgeries. (paras 78 & 82)

C **Case(s) referred to:**

Abdul Wahab Abdullah & Anor v. Abdul Wahab Jam Jam [2008] 1 PIR 30 ***(refd)***

Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(refd)***

Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors [2011] 1 LNS 33 HC ***(refd)***

D *Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA* ***(refd)***

Chan Peng Fook v. Kan Pak Lee [1974] 1 LNS 18 HC ***(refd)***

Chong Ying Khoon v. Lee Joo Kam & Anor [1988] 1 CLJ 795; [1988] 1 CLJ (Rep) 473 HC ***(refd)***

Fatimah Derakmak v. Wan Jusoh Wan Kolok & Anor [1994] 4 CLJ 537 HC ***(refd)***

Frank Astle Ward v. Malaysian Airlines System Bhd [1991] 3 CLJ 2053 SC ***(refd)***

E *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC* ***(refd)***

Kalyani Kunjamboo v. Selangor Medical Centre Sdn Bhd and Dr Zainal Ariffin (Shah Alam Sessions Court No. 3-52-3519-2001) (Unreported) ***(refd)***

Lee Bang v. Nadzri [1965] 1 LNS 82 HC ***(refd)***

Lee Yaw Long v. Dr Ganapathi Pillai & Ors (KL High Court No. 22-299-2003) (Unreported) ***(refd)***

F *Lim Ah Chi v. Tan Ah Mui & Anor [1968] 1 LNS 67 FC* ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Mani Rajan Subramanian & Anor v. Mohamed Kamal Ishak [2010] 1 PIR 38 ***(refd)***

Mohd Azhar Mohd Nasir & Anor v. Lee Xuai Wen (Rayuan Sivil J-04-563-11-2011) (Unreported) ***(refd)***

G *Muhamad Haziq Amsyar & Anor v. Government of Malaysia (Ipoh High Court No. 22-307-2003)* ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***

Punnithawatty Kumarasamy & 2 Ors v. Dr Norhayati Hamid & Ors (KL High Court No. 21NCVC-59-08-2013) (Unreported) ***(refd)***

H *Saripah Mahmud lwn. Govindaraju Venkatachalam & Satu Lagi [2011] 1 LNS 828 HC* ***(refd)***

Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor [2012] 3 CLJ 450 CA ***(foll)***

Soo Cheng Lin v. Dr Kok Choong Seng & Anor & Other Appeal [2016] 8 CLJ 368 CA ***(refd)***

Tan Cheng Poh & Anor v. Teoh Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

I *Thivya Ruban Thyagarajan v. Government of Malaysia (Shah Alam High Court No. MTI-21-170-2005) (Unreported)* ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(1)(a), (2)(d)(ii)
Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 59 r. 7

For the plaintiff - MS Dhillion & Dev Sundram; M/s PS Ranjan & Co
For the 2nd defendant - Harikannan Ragavan & WF Wong; M/s Jayadeep Hari & Jamil

[Editor's note: The Court of Appeal case, Soo Cheng Lin v. Dr Kok Choong Seng & Anor & Other Appeal cited in para 23 of the judgment has since been reported in [2016] 8 CLJ 368.]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This was a case involving a medical negligence claim which proceeded only with a trial on an assessment of damages, following the admission of liability by the second defendant. The plaintiff recorded a consent judgment with the first defendant and withdrew its claim against the third defendant.

Key Background Facts

The Parties

[2] The plaintiff, Miss Sheela Christina Nair sought treatment at Regency Specialist Hospital, which was owned and run by the first defendant and was admitted on 27 September 2013 for a surgical procedure for adhesiolysis and myomectomy to remove her fibroids. The surgery was performed on the same day by the second defendant, Dr Thokha B Muhammad, a Consultant Obstetrician and Gynaecologist practising in Regency Hospital. Whilst successful in removing her fibroids, the surgery resulted in the plaintiff suffering injuries. The third defendant, Dr Paul Ling Kah Hing was the Consultant Cardiologist who examined the plaintiff at the first defendant hospital.

The Injuries And Conditions Of The Plaintiff During And After Hospitalisation And Treatments

[3] Before I evaluate the evidence supporting the contention of parties on the assessment of damages, I think it would be apposite that the injuries suffered by the plaintiff be stated and her conditions during and after hospitalisation described in general terms to the extent useful for present purposes.

[4] The laparotomy operation performed by the second defendant on 27 September 2013 caused perforation of the plaintiff's small intestines. The plaintiff experienced abdominal pain and began to exhibit signs and symptoms of sepsis as a result. There was contamination of the abdominal cavity which further resulted in complications. On the third post-operative day, the plaintiff developed atrial fibrillation with low blood pressure. Notwithstanding, throughout the plaintiff's admission at the first defendant

hospital from 27 September 2013 to 30 September 2013, no diagnosis of perforation was made. The plaintiff was then transferred by her family members to KPJ Puteri Specialist Hospital ("Puteri Hospital") on 30 September 2013 but as her condition worsened, and following a delayed diagnosis of perforation, the plaintiff was, after only a day in Puteri Hospital, subsequently transferred out of Puteri Hospital to National University Hospital Singapore ("NUH Singapore"). Post-operatively the plaintiff's recovery was thus recorded to be stormy.

[5] The specialist medical report by Dr Cheong Wai Kit, Head and Senior Consultant Surgeon, Division of Colorectal Surgery, NUH Singapore recorded that upon admission to NUH Singapore, the plaintiff was "very sick with generalised peritonitis and in septic shock". She was suffering from severe infection due to the intestine perforation, and whose condition was exacerbated by "fast atrial fibrillation and acute renal failure" complications.

[6] In view of the complications, the plaintiff had to undergo a resuscitation and stabilisation procedure followed by an emergency laparotomy at 1.12am on 2 October 2013. During the surgery it was discovered that 60cm of the plaintiff's small intestine adjacent to the perforation was unhealthy, and was thus removed by a resection. A peritoneal washout to look for malignant cells and a temporary abdominal closure were then performed on the plaintiff.

[7] As the plaintiff's condition became more stable, another laparotomy was done at 1.28pm on 3 October 2013, merely one day after the previous laparotomy. This was performed to have part of the plaintiff's intestines surgically brought out as an end ileostomy in order to allow for faecal waste and intestinal material being discharged into a stoma bag. The plaintiff again underwent a peritoneal washout, and drains were inserted before her abdominal wound was closed. In addition, the specialist medical report from NUH Singapore also highlighted that the plaintiff's post-surgical recovery was complicated by the following conditions:

(i) "Infected intra-peritoneal collections requiring prolonged peritoneal drainage, prolonged courses of antibiotics and CT scan-guided percutaneous insertion of peritoneal drains";

(ii) "Wound infection requiring prolonged dressing with vacuum dressing system";

(iii) "Respiratory failure with lung infections, atelectasis and pleural effusion requiring ventilation, prolonged antibiotic treatment, drainage of pleural effusion and chest physiotherapy";

(iv) "Acute renal injury";

(v) "Malnutrition requiring prolonged total parenteral and enteral nutrition"; and

(vi) "Prolonged paralytic ileus".

[8] In order to supply the plaintiff with parenteral nutrition, a port was created below her neck through which the infusion was undertaken. The plaintiff was then discharged from NUH Singapore on 24 October 2013.

[9] However, the plaintiff had to be re-admitted to NUH Singapore on 2 November 2013 given the following problems as recorded by the specialist medical report from NUH Singapore:

(i) "urinary tract infection requiring antibiotic treatment"; and

(ii) "high ileostomy output requiring rehydration and medications to reduce output".

[10] The plaintiff was admitted for eight days and discharged from NUH Singapore on 9 November 2013, but again less than two months later had to be re-admitted on 3 January 2014 to Puteri Hospital as it was diagnosed that she was suffering from "giddiness, vomiting and poor appetite". An ultrasound and CT scan investigation revealed the presence of an abscess at the plaintiff's liver, which was then drained and the plaintiff was again put on antibiotics, before being discharged on 12 January 2014.

[11] The plaintiff was then again admitted to NUH Singapore, her third, on 27 March 2014 as she experienced significant fluid loss and her body weight declining. The reversal of the ileostomy to rejoin the intestines was performed and the stoma removed. The plaintiff was discharged on 2 April 2014.

[12] Post the third discharge from NUH Singapore, the plaintiff had to attend numerous follow-up consultations at NUH Singapore and taken efforts to rehabilitate herself at home. It is a fair statement to make that the plaintiff thus had to endure a prolonged period of recovery from the serious injuries she suffered as a result of the negligence of the second defendant at the first defendant hospital. The plaintiff frequently experiences abdominal pain and urinary tract infections. Since her surgeries, she has had more frequent loose stools. The plaintiff had to use a walker and wheelchair for a period of time after her surgeries. In addition, the various surgical procedures also left the plaintiff with multiple scars, specifically:

(i) a 10.5 cm pfannenstiel abdominal incision scar;

(ii) a 15.5 cm midline scar from epigastrium to hypogastrium;

(iii) a transverse scar at the site of the ileostomy at the right lower abdomen; and

(iv) Four small scars at the drainage sites.

A **The Trial**

[13] The second defendant admitted liability on the very day the trial was to commence on 12 October 2015. The trial on quantum then proceeded for two days on 8 November 2015 and 6 December 2015.

B **[14]** A total of six witnesses gave evidence for the plaintiff, as follows:

(i) The plaintiff herself (PW1);

(ii) The plaintiff's brother, Dr Marvin Joseph Nair (PW2);

(iii) Dr MV Kumar, Professor of Surgery at Melaka Manipal Medical
C College (expert witness – PW3);

(iv) The plaintiff's sister, Ms Uma Mariann Nair (PW4);

(v) The plaintiff's sister-in-law, Ms Evelyn Chew Loy Yong (PW5); and

(vi) The plaintiff's business partner, Mr Pritam Singh a/l Lal Singh (PW6)

D

[15] The plaintiff did not call Dr Cheong Wai Kit of NUH Singapore as he was outside jurisdiction to allow for the service of a subpeona, but his medical report dated 30 October 2015 was agreed by parties to be a Part B document. The second defendant did not give evidence and called only his expert witness, Dr Vijeyasingham Rajasingam, a Consultant General Surgeon
E at Assunta Hospital, Petaling Jaya.

Evaluation And Determination On Quantum By This Court

[16] I will examine and make the necessary determination on each of the items of damages claimed by the plaintiff. In the process, where relevant, I
F will also highlight discrepancies in amount being claimed as pleaded in the plaintiff's statement of claim as compared against that stated in the written submissions of the parties.

Special Damages

G *Medical Expenses In Malaysia*

[17] It is not disputed that the plaintiff had incurred medical expenses locally in the sum of RM59,622.05 at Regency Hospital and Puteri Hospital. She had paid RM11,657.51 personally, RM671.70 remains unpaid and the rest, being an amount of RM47,292.84 was settled by the plaintiff's insurer.

H

[18] I should first deal with the issue of the claim for medical expenses being in respect of medical treatment sought and received by the plaintiff at a private hospital instead of at a Government hospital. The position in law on this specific point has been clearly elucidated by Abdul Hamid Mohamad JCA (as he then was, later Chief Justice) in the Court of Appeal decision in
I *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321; [2004] 2 MLJ 465 as follows:

59. To summarise my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But, when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:

(a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or

(b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or

(c) He must prove that that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by Kamalanathan Ratnam JC in *Chong Chee Kong* with whom I agree, we are concerned with treatment, not accommodation.

60. If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor* and by this court in *Hj Ariffin Hj Ismail* or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Sia Bak*. It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded.

61. Now, assuming that the plaintiff has crossed the first hurdle and the court is satisfied that the plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove that the expenses incurred and the amount claimed is reasonable taking into consideration normal charges at other local private hospitals. The court may award what it considers to be a reasonable amount which may even be the full amount claimed.

[19] The second defendant however did not raise any issue with the fact that the medical expenses in Malaysia were incurred by virtue of treatment sought by the plaintiff at private hospitals. In any event I would think that this is a correct position in the context of the instant case because the injuries were actually suffered at a private hospital in the first place, as this is after all a medical negligence suit, unlike cases involving personal injuries sustained through accidents, such as in *Chai Yee Chong* itself, where the

plaintiff suffered serious injuries at work which were later at some stage treated at private hospitals. As such, in the instant case, given primarily the absence of any dispute raised by the second defendant on the matter, I do not consider this to be an issue, even in respect of expenses incurred pursuant to the subsequent treatment of the plaintiff at Puteri Hospital.

[20] The more substantive issue, and one which is resisted by the second defendant is on the deductibility of insurance claims payouts. The plaintiff contended that the sum paid by the insurer ought to be recovered by her for otherwise the second defendant would benefit from the plaintiff's insurance arrangement for which the plaintiff had paid premium. Further, this the plaintiff submits, is also within the true interpretation of s. 28A(1)(a) of the Civil Law Act 1956 which provides as follows:

> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect to of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act.

[21] In addition, the position taken by the plaintiff is also supported by the Supreme Court decision in *Frank Astle Ward v. Malaysian Airlines System Bhd* [1991] 3 CLJ 2053, where Mohd Azmi SCJ said the following:

> To put the issue of deductibility beyond doubt in the present appeal, our Parliament has fortunately for the appellant, introduced s. 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere solution against deductibility. We agree with Mr RK Nathan (as he then was) that the plain meaning of the word used in that section should be adopted for the purpose of interpretation. *Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death "under any contract of assurance or insurance" shall not be taken into account in assessing damages.* By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme ... For the above reasons, it is our opinion that having regard to the nature of the scheme of the policy, the **insurance benefits in this case are not deductible both under s. 28A(1)(a)and the common law itself**. (emphasis added)

[22] Having reviewed the law on this specific question however, I take the view that I am clearly bound by the decision of the Court of Appeal in *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* [2012] 3 CLJ 450 which held that the provision of s. 28A(1) of the Civil Law Act 1956 did not apply to a claim for medical expenses incurred whilst undergoing treatment at hospital as the claimant would be considered not to have suffered any out of pocket expenses which instead was borne by the insurance company. The Court of Appeal drew a clear distinction between general and special damages, ruling that s. 28A(1) covers only general damages which was the

situation in *Frank Astle Ward*, and not out of pocket special damages like in the instant case. His Lordship Raus Sharif PCA, delivering the judgment of the Court of Appeal held as follows:

> [1] The case of *Frank Astle* dealt with the issue of deductibility in respect of payment for loss of earning which was a part of general damages. In situation as such, s. 28A(1) of the Civil Law Act 1956 ('the Act') has clearly stated that insurance payments are not deductible. Whereas, in the present case, the 1st respondent's claim was for medical expenses incurred while undergoing treatment at the hospital. Hence, *Frank Astle* and s. 28A(1) of the Act had no application to this case ….
>
> [2] The sum paid for the medical expenses were out of pocket expenses and was therefore special damages. The test to apply in a claim for special damages would be whether the 1st respondent had incurred those expenses or had paid an amount which resulted in a loss to him. Since the 1st respondent did not pay the medical expenses, he suffered no loss and therefore, was not entitled to such claim. Further, to allow such claim would tantamount to facilitating the 1st respondent's enrichment and it would be contrary to the universal rule that he is not allowed to recover something which he has not lost (*Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy*, foll) …

[23] In other words, since medical expenses claims are under the law in the nature of special damages, it must therefore be established that the claimant incurred out of pocket expenses. Since those parts of the plaintiff's medical bills were paid by the insurer, the extent of such settlement by the insurer does not amount to "out of pocket expenses" for the plaintiff. This was not incurred or expended by the plaintiff and therefore is not, for lack of better word, "a loss" to her. The principle of compensatory damages in the law of torts applicable in this country today is that a plaintiff cannot recover more than that he has lost, for otherwise it would unjustly enrich the plaintiff. The plaintiff submitted that a subsequent Court of Appeal decision in *Soo Cheng Lin v. Dr Kok Choong Seng & Anor & Other Appeal* [2016] 8 CLJ 368 (No. B-02-710-03-2013) had given leave for the issue to be appealed to the Federal Court and in *Dr Nor Izham Aziz v. Purushothaman Nair* the Court of Appeal indicated it was not going to follow *Sathisvaran*. I am also aware of another unreported case of *Mohd Azhar Mohd Nasir & Anor v. Lee Xuai Wen* (Rayuan Sivil J-04-563-11-2011) which also did not follow *Sathisvaran*. However there are no written judgments in these cases as against the judgment delivered by the President of the Court of Appeal in *Sathisvaran* which discussed this specific issue.

[24] Accordingly, I am constrained to hold that the payments made by the plaintiff's insurer in respect of parts of the medical bills issued by Regency Hospital and Puteri Hospital, totalling RM47,292.84 is not recoverable. The total allowed by this court for medical expenses in Malaysia as supported by documentary evidence is therefore RM11,657.51.

Medical Expenses At NUH Singapore

[25] In respect of the claim for medical expenses at NUH Singapore, the principles set out by the Court of Appeal in *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321; [2004] 2 MLJ 465 must be observed. The issue is the fact that treatment was sought at a hospital overseas. On this, I can do no better than reproduce the relevant passage from, again the judgment of Abdul Hamid Mohamad JCA (as he then was) which is most instructive as it is directly on point, as follows:

> 62. Even though this case does not concern treatment at a private hospital in Singapore, in view of the number of cases, all at High Court level, particularly from Johor, that involve treatment at private hospitals in Singapore, something has to be said about it. The courts in Johor have been treating the treatment in private hospitals in Singapore as equivalent to treatment in local private hospitals for one reason only: proximity between Johor and Singapore. In my view, that is overlooking other relevant factors. No one can deny that the cost of living in Singapore is higher, salaries are higher, rentals are higher than in Malaysia. No one can deny that one Singapore dollar is more than double the value of the Malaysian Ringgit.
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> 63. So, in the case of treatment at a private hospital in Singapore, it must be proved to the satisfaction of the court as in the case of treatment at a private hospital locally. Then, it must be proved that the treatment is not available at private hospitals locally, or for some sufficient reasons, the treatment at a private hospital locally is inadequate. In other words, it is the same test as that applicable to justify treatment at a private hospital locally, except that the test is applied to local private hospitals instead of a government hospital.
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> 64. If the court finds that the plaintiff is not justified to seek medical treatment at a private hospital in Singapore, but is justified to seek medical treatment at a private hospital locally, the court should only award an amount similar to that which would be awarded had the plaintiff sought medical treatment at a local private hospital.
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> 65. But, if the court is satisfied that the plaintiff is justified in obtaining medical treatment in Singapore, then the court should consider the reasonable amount to be awarded which may be the full amount claimed or less.

[26] Despite the submissions of the parties on the issue, it was not highlighted by either side as to whether NUH Singapore is to be deemed as a private or a government hospital. I make no determination on this question. Again, I am of the view that in the context of claims of medical expenses for treatment in the Republic, the more substantive issue of contention is the fact that it was incurred in a foreign country where expenses generally are considered more costly than in this country. This is evident even from the passage of the judgment of Abdul Hamid Mohamad JCA (as he then was) as set out earlier, where despite making express reference to private hospitals

in Singapore, also clearly highlighted the higher cost of living in the Republic generally, and in any event did not say that treatment at a Government hospital in Singapore does not have to demonstrate fulfilment of the requirements established in that case. In my view, the concern is predominantly and clearly on costs, and that any order of damages on the party at fault is reasonable and not excessive, such that when treatment is sought in a foreign country, the ownership structure of the hospital is of secondary importance when compared with the fact of the higher cost of living in that country.

[27] Accordingly, the test to be met in respect of admission to a private hospital locally ought to similarly apply to the instant case as treatment was sought by the plaintiff outside the country. Following *Chai Yee Chong*, the plaintiff must prove first that she was justified in having sought treatment at a hospital in Singapore, and secondly, the amount incurred was reasonable. In relation to the first hurdle, the plaintiff must prove any of the following:

(a) She must prove that that particular treatment is not available at Puteri Hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or

(b) She must prove that although the treatment is available at Puteri Hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the hospital or for other sufficient reasons; or

(c) She must prove that the treatment at Puteri Hospital although available, is grossly inadequate. This may be due to the lack of trained doctors in that particular field or for some other good reasons.

[28] The testimony concerning the availability and suitability of medical expertise and facilities at Puteri Hospital to treat the plaintiff came entirely from PW2, the plaintiff's brother. Although PW2 is an Orthopedic Surgeon at Puteri Hospital itself, and had also previously worked at NUH Singapore, no evidence had been adduced from any of the doctors who treated the plaintiff to testify on her medical condition during the period of her admission to Puteri Hospital that single day on 30 September 2013, or any other representatives from Puteri Hospital on the state of the hospital's expertise, facilities and resources, and *vis-à-vis* its capabilities to resolve the injuries and problems suffered by the plaintiff relating to the perforation of the bowel. The brief letter dated 7 November 2015 marked as "ID1", signed by one Dr Hasnahbi Ahmad Jan, Consultant Physician, claimed by PW2 to be one of the physicians who attended to the plaintiff for that one day at Puteri Hospital cannot however be admitted in evidence since she was not called to give evidence during trial as she was said to be undergoing treatment then. In any event, even though ID1 did state NUH Singapore to be the best equipped centre to treat the plaintiff, it did not touch on the availability of the treatment at Puteri Hospital at all.

[29] Whilst PW2's testimony on his assessment of the conditions of the plaintiff (such as she was going into multiple organ failures, her heart was not beating properly, she was passing form a stage of septicemic shock to irreversible shock and even at the risk of dying as well as that the window to prevent transition to irreversible shock was very short), more than amply demonstrates the seriousness and urgency of the situation faced by the plaintiff, on the totality of the evidence, I am however not convinced that the plaintiff has sufficiently proven the fulfilment of the requirements set out by *Chai Yee Chong*. Although Puteri Hospital only diagnosed bowel perforation at 6.45pm on 1 October 2013, some 25 hours after her admission, and even that was after various interventions by PW2 himself, it cannot in my view be said that the particular treatment is not available or that it is grossly inadequate, not least since a laparotomy operation was in fact then scheduled for the plaintiff. Nor can it be said that the decision of Puteri Hospital to have the surgery done the morning after tantamount to the treatment being unavailable within a reasonable period *vis-à-vis* the urgency of the plaintiff's condition. There is also no evidence to show that a specific request had been made on behalf of the plaintiff for Puteri Hospital to move the operation to be done earlier.

[30] PW2 himself agreed that none of the doctors treating the plaintiff, who are his own colleagues, informed PW2 that they or Puteri Hospital could not handle the medical situation then faced by the plaintiff or that the plaintiff should be transferred to another better equipped hospital. None of the expert evidence or reports in this case unequivocally supports this observation either. Further, PW2 could not at the material time when deciding on the transfer, determine whether the plaintiff required Specialist Intensive Care Unit which is not available at Puteri Hospital. During cross-examination PW2 himself agreed that the decision to transfer the plaintiff to NUH Singapore was almost entirely his, and the letter by the late Dr Hasnahbi Ahmad Jan was prepared at his specific request for the purpose of the trial.

[31] Accordingly, it is my view that although the major involvement of PW2 in the transfer of the plaintiff from Puteri Hospital to NUH Singapore (and from Regency to Puteri Hospital before that) was naturally not unexpected and nevertheless still commendable, I am constrained to hold that the plaintiff has not proven that the transfer to NUH Singapore from Puteri Hospital was justified or reasonable according to the test enunciated by *Chai Yee Chong*. As such the plaintiff is to be awarded one-third (following the guideline stated in *Chai Yee Chong*), which I find to be reasonable, of the out of pocket medical expenses incurred at NUH Singapore which must similarly be after deducting the portion paid by the relevant insurance company. Thus RM237,692.75 minus RM90,205.77 equals RM147,486.98 which is then multiplied by 1/3, resulting in an award of RM49,162.23.

Travelling Expenses

[32] Although travelling expenses is a form of special damages which must therefore be strictly proven, the primary question for determination is whether the expenses was reasonably incurred. In the first place it cannot be denied that the visits by family members of the plaintiff to the three hospitals to provide the necessary care and support during the prolonged period of hospitalisation are directly a consequence of the negligence of the second defendant. As the frequency of the visits of the relevant family members is in my view reasonable, I am satisfied that the plaintiff has successfully proven her claim even in the absence of documentary evidence for each and every travel given the nature of travelling expenses as there were instances where the said family members travelled on their own transportation, and it would be farfetched to expect them to issue receipts themselves.

[33] Based on a hospitalisation period of 52 days (comprising five days in Regency Hospital, 11 days in Puteri and 36 days in NUH Singapore) I accept the evidence by the witnesses as submitted by the plaintiff as follows:

(i) for Dr Marvin Joseph Nair (PW2), for five visits to NUH Singapore at RM145 per visits totals RM725;

(ii) in respect of Ms Uma Mariann Nair (PW4), the plaintiff's sister and who resides in Singapore and made daily visits to NUH Singapore, the expenses would be SGD23 per trip x 36 x 3.05 being the exchange rate thus amounting to RM2,525.40. This should be on top of her travelling expenses to the two hospitals in Johor Bahru at RM140 per trip x 16 visits, totalling RM2,240.

(iii) in relation to Ms Evelyn Chew (PW5), the plaintiff's sister-in-law and principal caregiver during the hospitalisation of the plaintiff, her evidence is that she made daily visit to NUH Singapore between one and three times a day. As the principal caregiver and considering the condition of the plaintiff, I agree that it is reasonable for these regular visits to have been made. As such, SGD20 x average of two visits per day x 36 days would amount to RM1,440. I also agree that the amount of RM1,525 as travelling expenses be awarded for PW5's travelling expenses in providing care for the plaintiff in Malaysia beyond the days in hospital for a period of about three months, beginning 2014.

[34] Accordingly I allow the plaintiff's claim for travelling costs of her family members related to their visits to provide support and care for the plaintiff during, and for PW5, beyond her hospitalisation, amounting to RM8,455.40, as submitted. I believe however, the figure of RM10,255.80 stated in the written submission of the plaintiff to be incorrectly calculated. Nevertheless, since the plaintiff, as a matter of fact, despite the written submission, only pleaded for RM3,310, the award will in any event, be limited to this sum of RM3,310.

Loss Of Income (a) Truwater Resources

[35] The plaintiff claimed to have three sources of income before the pertinent surgery at Regency Hospital on 27 September 2013. As a result of her injuries, the plaintiff pleaded to have lost some of her earnings from working at Truwater Resources and from giving personal tuition and all of her income from teaching at Erican Language Centre.

[36] Truwater Resources filters water and packs the filtered water into bottles of various sizes before delivering the bottles to customers. Both the plaintiff and her business partner Mr Pritam Singh (PW6) gave evidence that prior to her injuries, the plaintiff was paid RM3,000 monthly through petty cash. The plaintiff was unable to work from 27 September 2013 until the end of December 2014 but has since returned at work at Truwater Resources but only for a few hours a day or three times weekly and at a reduced monthly salary of between RM1,500 and RM2,000 as well as can only manage lighter duties due to lower abdominal pain.

[37] The plaintiff therefore claims loss of earnings of RM42,000 for the period between October 2013 and December 2014 (RM3,000 per month x 14 months) plus RM1,750 for the one month period early 2015, resulting in a total of RM43,750.

[38] The key challenge by the second defendant against this claim is that there was no documentary evidence to show that the plaintiff was earning RM3,000 a month from Truwater Resources, and that despite the plaintiff stating in evidence that there would be petty cash vouchers to evidence her monthly salary payment of RM3,000, none was however produced in court. The second defendant submits that the court should invoke an adverse inference against the failure by the plaintiff to produce such petty cash vouchers under s. 114(g) of Evidence Act 1950.

[39] It is not the law that a claim for loss of earnings will never succeed in the absence of supporting documents to show the earnings. Although this point is not submitted by the parties, it should be noted that there are a number of case law authorities where such claims were nevertheless allowed. In *Fatimah Derakmak v. Wan Jusoh Wan Kolok & Anor* [1994] 4 CLJ 537 the High Court accepted the evidence of the plaintiff, a fruit seller that her monthly income was RM600 in the absence of any document. In *Lim Ah Chi v. Tan Ah Mui & Anor* [1968] 1 LNS 67; [1969] 1 MLJ 215 the Federal Court took judicial notice of the income of a "pow" seller. In *Saripah Mahmud lwn. Govindaraju Venkatachalam & Satu Lagi* [2011] 1 LNS 828 the High Court took judicial notice that the income of a small scale fish and vegetable seller to be RM1,000 monthly without documentary support. Again, in *Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 the High Court took judicial notice on the average earnings of marble grinding contract workers to be in the region of about RM700 per month. In the case of *Chan Peng Fook v. Kan Pak Lee* [1974] 1

LNS 18; [1974] 2 MLJ 197 the earnings of an average carpenter was assessed to be RM150 per month in the absence of any document and even when the employer of the plaintiff was not called to give evidence as witness.

[40] However, the cases I mentioned largely concern small scale income earners where documentary records are not expected to be in existence in respect of the activities they do. In the instant case however the plaintiff is undertaking a partnership business and documents such as the income statement from Truwater Resources for the period of July 2013 to December 2013 is available and has been included in bundle O as have numerous other invoices, delivery orders and receipts. Yet the plaintiff chose not to include petty cash vouchers which according to the plaintiff were available and this could have provided support to her assertion that her monthly salary was RM3,000. Nevertheless, I do not think that this omission is necessarily fatal to the claim since the plaintiff's evidence is also supported by PW6, her business partner, and further corroborated by the income statement from July 2013 to December 2013 (p. 81 of Bundle O) itself which stated the salary of RM3,000 paid to each of the plaintiff and PW6 during the period.

[41] As such I am satisfied that the plaintiff has proven her case for loss of earnings at Truwater Resources for a total amount of RM43,750.

Loss Of Income (b) Private Tuition

[42] The second source of income pre-injury is said to be from the plaintiff's giving tuition to eight students from Kota Tinggi at Truwater Resources' premises during lunch hour. The plaintiff now claims loss of income of RM22,500 during the period of October 2013 to January 2015. She testified that she earned about RM1,700 to RM1,900 a month but now could only teach one student at between RM200 and RM400 per month, due to her experiencing tiredness.

[43] In addition to the total absence of any documentary evidence, which is not necessarily unacceptable, more crucially the plaintiff's testimony on this claim is not supported by any other witness, especially in relation to any of the parents of the said eight students despite the plaintiff agreeing during cross-examination that two of the parents were contactable. Even PW6, her business partner was not asked to confirm whether it was true that the business premises of Truwater Resources was used to hold the tuition sessions.

[44] I am accordingly satisfied that based on the evidence available, the plaintiff has not proven her case to claim loss of income as a personal tutor which is therefore not allowed.

Loss Of Income (c) Erican Language Centre

[45] The third source of income claimed by the plaintiff is her earnings from teaching at Erican Language Centre for five days a week between 7.30 pm and 10pm daily. Prior to the plaintiff's injuries, she earned between

RM900 and RM1,100 monthly. The plaintiff therefore claims the award of RM15,000 as loss of income from Erican Language Centre for the period between October 2013 and January 2015 being RM1,000 x 15 months.

[46] The plaintiff also testified that she is still unable to work at Erican Language Centre as she experienced tiredness, pain and cannot stand for long hours. The plaintiff has furnished documents (pp. 236 & 237 bundle O), specifically, the instructor's salary report that shows her pay for September 2013 to be RM910 and the amount deposited into the plaintiff's bank account in March 2013 to be even lower, at RM700.

[47] The second defendant concedes that the plaintiff could not have worked for 12 months post-surgery, and thus agreed to an amount of RM10,920 on the basis of an earnings of RM910 monthly for a period of 12 months post surgery. I agree that the earnings of RM910 be accepted given the aforesaid documentary support and the relevant period of 12 months, as submitted by the second defendant to be more reasonable. Accordingly, I allow the award for loss of income from Erican Language Centre of RM10,920. Although the total actual loss of earnings when added to the income from Truwater Resources is RM54,670, the amount actually pleaded by the plaintiff as loss of income from all sources is only RM40,500, I shall thus award only RM40,500 as loss of income.

Loss Of Business Income

[48] The plaintiff also pleaded for an award of loss of business income of RM72,000. However the main written submission of the plaintiff did not clearly make reference to this claim. In any event, based on the income statement for Truwater Resources for the period of July 2013 to December 2013 (p. 81 of bundle O), the gross profit for the months of August and September 2013 pre-injury was similar to the amount recorded in December 2013. This certainly suggests that the plaintiff's absence which was claimed by PW6 to have adversely affected the business, did not actually result in loss of income to the firm. In fact the total sales for December 2013 was only very slightly less than that in September 2013. Furthermore, I find the documents to be of insufficient clarity to assist the court make a more accurate comparison of the income figures before and after injuries. Therefore the claim for the award of RM72,000 for loss of business income is not allowed.

Cost Of Obtaining Medical Reports

[49] The claim for RM400 being the fee charged by Regency Hospital for medical report, supported by an invoice, is allowed.

Cost Of Extra Nourishing Food & Nutritional Supplements

[50] The plaintiff had given evidence that these costs are reasonably incurred to purchase vitamins, juices, Chinese herbal soup and other soft food including steam fish.

[51] I observe however that there is no medical evidence that the plaintiff indeed required such medical items or any evidence that these items are proven to be extra nourishing in the first place. Neither has the plaintiff shown any document to evidence the purchase or even to provide a breakdown in respect of the costs of each of such items.

[52] It has not been shown that the claim for the costs of extra nourishing food and nutritional supplements for RM9,150 was reasonably incurred. I therefore do not make any award on this item.

Cost Of Medical Supplies, Equipment And Appliances

[53] The plaintiff gave evidence that following treatment at Regency Hospital, ileostomy stoma bags would have to be used, rental of VAC equipment was necessary to extract pus from the wound and other disposable items such as alcohol swabs, gloves, saline and plastic bags had to be purchased. The plaintiff had also visited New Teban Clinic in Singapore several times to have her wound cleaned.

[54] The plaintiff produced the relevant receipts for the above items of purchases and services, all of which were paid by her family members. I find the claim reasonably incurred and sufficiently proven. I therefore allow the claim for cost of medical supplies, equipment and appliance as set out in the written submission of the plaintiff for the amount of RM1,717.74. I do not agree with the pleaded amount of RM11,137.95, even though this higher amount was conceded by the second defendant because this figure is not supported by evidence and in any event not repeated by the plaintiff in her written submissions which instead proposed the RM1,717.74 only.

Cost Of Care by Family Members

[55] The plaintiff was assisted by members of her family namely her doctor brother PW2; more so her sister PW4 and especially her sister-in-law PW5, during hospitalisation of the plaintiff, and thereafter during recovery.

[56] The plaintiff is claiming the sum of RM1,500 per month for the cost of care given by her family for a period of six months, thus amounting to RM9,000. The second defendant conceded that the plaintiff required such care and support from her family and agreed to the pleaded amount of RM12,180 which is higher than the said sum of RM9,000 stated by the plaintiff in her written submission. Given the nature and extent of the injuries, I agree that an award of RM12,180 for the cost of care by members of the plaintiff's family is justified and reasonable, and thus allow the same.

Cost Of Professional Nursing Care

[57] The plaintiff also claims for the cost of hiring professional nurse from Kang Xin Care Centre, supported by receipts for RM2,075 paid for by family members. The plaintiff gave evidence that she needed the services of professional nursing care because she was losing a lot of fluids and weight

and had to be kept adequately hydrated. The second defendant however contended that this was extra care, even additional to the care by her family members, and therefore on the authority of case laws such as the High Court decision in of *Chong Ying Khoon v. Lee Joo Kam & Anor* [1988] 1 CLJ 795; [1988] 1 CLJ (Rep) 473, the plaintiff must prove by medical evidence that she indeed required such extra care. It should be noted that the case of *Chong Ying Khoon* actually applied the principle in the Federal Court decision of *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190, where Salleh Abas CJ (Malaya) (as he then was, later Lord President) said, in respect of a claim for cost of extra care, as follows:

> To deal with the respondent's submission first, we are of the view that this submission lacks foundation and substance because there is no evidence that the respondent's injuries are such that he requires future care, nor is there any evidence that his life expectancy is in any way affected. None of the five doctors who treated and examined him made any reference to the respondent's life expectancy.
>
> **In my view, those who make claims based on extra care - and such claims are generally substantial – must be prepared to substantiate them properly by competent medical evidence**. In this case, far from calling medical evidence to substantiate the wife's assertion, the medical evidence went to contradict it, not expressly, but by necessary implication. Moreover, I see no reason why the use of a walking stick should not make the plaintiff independent.
>
> In the circumstances, I have no alternative but to make no award under this head. (emphasis added)

[58] In my evaluation, I find the argument of the second defendant not to be without merit considering the cases, and given the absence of medical evidence, I do not allow the award of RM2,075 being claimed by the plaintiff for the cost of professional nursing case.

Claim For Cost Of New Clothes

[59] In her written submissions, the plaintiff is claiming RM350 for the purchase of new clothes due to her weight loss of about 20kg which resulted from the injuries. I however agree with the second defendant that this claim should be dismissed since there are no documents which could have been tendered to show that the plaintiff had incurred such costs to prove this item of special damage. Nor did the plaintiff testify on this.

Claim Of Cost Of Physiotherapy

[60] The plaintiff's claim for RM720 being the costs for various physiotherapy sessions is supported by receipts (pp. 244-247 Bundle O) and conceded by the second defendant. I therefore agree that the cost is reasonably incurred and allow the award of RM720 for cost of physiotherapy.

Cost Of Obtaining A Court Order For Discovery Of Medical Records

[61] As the Regency Hospital did not provide the plaintiff with her medical records despite her solicitors' request, the plaintiff had to institute an originating summons to obtain discovery for which she incurred RM7,420 in legal fees which is now being claimed against the second defendant.

[62] The second defendant contested this, contending that the medical records were not in the possession of the second defendant nor does he have any authority on the decision to release the same with or without a court order.

[63] I am inclined to agree with the second defendant. After all, the originating summons for discovery instituted by the plaintiff too did not involve the second defendant as a party. The plaintiff's reliance on the High Court decision of *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825 is in my view not determinative of the issue in the instant case because the High Court in that case refers generally to the duty of physicians or the hospitals to deal with the medical records in the best interest of the patients. Significantly it was held that "the ownership of a patient's medical record vests with the physician or hospital, as the case may be". In the instant case, the second defendant had responded to the plaintiff's request by stating his lack of authority to decide on the matter. This resulted in the plaintiff filing the originating summons against the first defendant. I do not find that there are further contentions of the plaintiff that substantiate her claim against the second defendant. It has not been shown that in the set-up of a private hospital such as Regency Hospital, its legal and contractual relationship with its specialists who are invariably independent contractors, includes the arrangement that any decision to release medical records vests with the latter.

[64] As such, since this specific item of claim has not been shown to have been caused by the second defendant, the award for cost of obtaining the court order for discovery of medical records of the plaintiff therefore is not proven, and is accordingly not allowed.

General Damages

Pain And Suffering

[65] In considering the pain and suffering and the loss of amenities of life of the plaintiff during the first three (Regency, Puteri and NUH, as mentioned above) and subsequent three hospital admissions (NUH, Puteri and finally NUH), and the pain and suffering following the final discharge from hospital, as well as for the scars, I have also examined other relevant case law precedents involving generally comparable injuries. In the first place, I agree with the contention of the second defendant that the plaintiff had not sufficiently made out a case the award of general damages to be awarded individually, not least due to the absence of any case law authority to justify

the same. In my view, it is more appropriate in the instant case for a lump sum award be given in order to avoid possible overlaps amongst the various categories of pain and suffering; a position which it also consistent with the established approach by the courts in favouring lump sum awards such as in the Court of Appeal decision in *Tan Cheng Poh & Anor v. Teoh Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ 89.

[66] In relation to the four cases submitted by the plaintiff, I agree that *Yoong Lih Pyng v. Dr Yang Tin Ha* (MT2-22-103-2008 Seremban High Court) and *Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & 2 Ors* [2011] 1 LNS 33; [2011] 2 AMR 741 do not involve similar injuries to assist the court making a useful comparison. The former case involves the removal of uterus resulting in loss of ability to conceive and the latter, a total knee replacement surgery. Nevertheless, these cases concern injuries requiring lengthy surgical and medical intervention which would be of relevant consideration in comparison to the fairly lengthy period of various treatment endured by the plaintiff in her six hospital admissions. The award for *Yoong Lih Pyng* was RM200,000 whilst that for *Chai Beng Hock* was higher at RM250,000.

[67] Pain and suffering following hospitalisation must also be taken into account. Based on the evidence given by the plaintiff herself, her brother PW2, her sister PW4 and her sister-in-law PW5, it is observed that the plaintiff's personal and social life has been affected in the following ways:

(i) the plaintiff experiences abdominal pain very often;

(ii) the plaintiff experiences urinary tract infections very often;

(iii) the plaintiff does not have a good appetite and only eats soft food;

(iv) the plaintiff has a phobia of eating rice as every time she eats rice she feels pain;

(v) the plaintiff is not as strong as she was before;

(vi) the plaintiff becomes tired easily and is not as energetic as before;

(vii) the plaintiff cannot stand or walk for long hours;

(viii) the plaintiff cannot perform well at work and can only do light work;

(ix) the plaintiff lost 13 kg; and

(x) the plaintiff cannot get up early to do housework like she used to; and

(xi) the plaintiff also suffers emotional stress.

[68] The report by Professor MV Kumar (PW1) on the status of the plaintiff at an interview and abdominal examination on 21 October 2015 also recorded that she had lost 20 kg at time of closure of ileostomy but was 59 kg at the time of the examination. The plaintiff also complained of tiredness and disturbed sleep and able to work only half a day. She also experienced lower abdominal pain caused by ongoing healing process to the tissues of the abdominal wall.

[69] In terms of greater similarity in the type of injuries, in two other cases submitted by the plaintiff the award granted were of a higher range. In *Lee Yaw Long v. Dr Ganapathi Pillai and 3 Ors* (KL High Court No. 22-299-2003) the injuries were to a short bowel syndrome and its related sequelae resulted in multiple operations over a period of 7 years. The award was RM250,000 but I agree with the contention of the second defendant that there was no mention of what was the post-surgery complication. Nevertheless it is reasonable to assume that such multiple operations must have consequences on some degree of complications. In *Punnithawatty Kumarasamy and 2 Ors v. Dr Norhayati Hamid and 7 Ors* (KL High Court No. 21NCVC-59-08-2013) which in my view is a more serious case compared to the instant case, the High Court awarded the sum of RM300,000 for a deceased patient who had to endure painful invasive and surgical procedures throughout a period of three years, including insertion and removal of tracheotomy tubes (through an opening in the throat) gastrostomy tubes (through an opening in the stomach) and chest tubes (to drain out fluid in the lungs).

[70] I am of the view that these two cases involve more serious injuries and resulting pain and suffering compared to the instant case. On the other hand however, I also take cognisance of the extent of the similarity exhibited in two other cases. The case of *Mani Rajan Subramanian & Anor v. Mohamed Kamal bin Ishak* [2010] 1 PIR 38 involved an award of RM40,000, where the patient had to undergo laparotomy and small bowel resection due to a perforated bowel whilst in *Abdul Wahab Abdullah & Anor v. Abdul Wahab Jam Jam* [2008] 1 PIR 30 the award was for RM60,000 in respect of ileum and sigmoid colon perforation but without disabilities suffered as a result thereof. However, whilst somewhat demonstrating a greater degree of similarity in the type of principal injuries, these two cases appear to suggest a lesser degree of pain and suffering in comparison to that experienced by the plaintiff in the instant case. The plaintiff submitted that a global award of RM275,000 be awarded for the general damages of pain and suffering and loss of amenities of life whilst the second defendant submitted that RM150,000 to be the appropriate sum of award instead.

[71] Given these precedents, and focusing on the circumstances which prevail in the instant case, in particular considering the physical injuries suffered by the plaintiff, and the pain and suffering as well as the deprivation of the amenities of life resulting therefore as well as from the scars, which continue till presently, including mental distress, I am of the view that a lump sum award of RM240,000 to be a reasonable and fair amount for the plaintiff's pain and suffering and loss of amenities.

Future Loss Of Earnings

[72] I have earlier agreed to award the plaintiff for the loss of earnings in respect of Truwater Resources and Erican Language Centre, but not from private tuition. I am satisfied based on evidence that the plaintiff was in good

health but for the injury and had been receiving earnings by her own labour. These awards had taken into amount the losses suffered by the plaintiff during the 15 months period from late September 2013 to January 2015. I thus agree with the submission by the second defendant that the plaintiff's claim for future loss of earnings cannot legitimately therefore include any period in time during the said 15 months which compensation has agreed to be given on the basis of actual loss of earnings. The provisions of s. 28A(2)(d)(ii) of the Civil Law Act 1956 concerning calculating awards of damages for loss of future earnings which refer to the words "at the time he was injured" should in my view accordingly be construed to continue until the end of the period of injury which entitles one to claim actual loss of earnings.

[73] Accordingly, as for future loss of earnings, since the plaintiff turned 47 in January 2015, the computation would be as follows:

55 years minus 47 years	= 8 years
(divided by 2)	= 4 years

[74] The 48 months (four years) is then multiplied by RM2,160 per month (being RM1,250 from Truwater Resources (ie, RM3,000 minus RM1,750 per month which is the amount continued to be drawn by the plaintiff) and RM910 from Erican Language Centre, per month), resulting in the award for future loss of earnings for the plaintiff to be the sum of RM103,680.

Future Medical Expenses For Non-Surgical Treatment

[75] In assessing the likely possibilities of the plaintiff's medical needs in the context of assessing damages in the present system of "once and for all assessment," expert medical evidence as well as factual evidence would be essential pre-requisites. The standard of proof for future general damages was very recently dealt with by the Federal Court in *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885 which established that although it is only necessary to show that there is a significant prospect as opposed to a mere speculative possibility that a plaintiff may suffer damage in the future, proof of that damage happening and the assessment of that damage is on a balance of probabilities. Thus, the standard of proof is not strict proof or specific proof but proof on a balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss in the future, and that the lower degree according to the Federal Court is best termed as a "possibility", "chance", "risk", "danger" or "likelihood" which must in any event not be speculative but substantial. Abdull Hamid Embong FCJ, delivering the judgment of the Federal Court held instructively as follows:

> (1) It is trite that damages serve as compensation, not a reward, less still a punishment. In assessing damages, the courts should not be motivated by sympathy and award fair compensation based on cogent evidence. The court could not descend into a domain of speculation. The evaluation of

evidence which form the basis of any risk of future damage, must still be undertaken. The trial judge could only evaluate such evidence based on the recognised balance of probability standard, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. Such a lower degree to be attached is best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative. (paras 20 & 24)

(2) While the plaintiff only needs to show that there is a reasonable chance of a loss or damage occurring in order for her to succeed in her claim for future loss or damage, the standard of proof required in proving such claim remains the same. The principles set out in *Schrump* and *Hawkins* merely outline the degree of certainty to be attached in relation to the assessment of the chance or likelihood that a loss or damage might reasonably happen in the future in a claim for future loss and damage. Such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which could be satisfied by the production of sufficient evidence from the expert or by some other cogent evidence. Thus, the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. (para 17)

(3) In determining a claim for future medical treatment, be it at a private or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration ...

[76] In the instant case, it is the contention of the plaintiff that following a number of laparotomy procedures performed on her, she is likely to develop adhesions and the complications resulting therefrom such as intestinal obstructions.

[77] Dr Vijeyasingham (DW1) gave evidence that when there was faecal contamination, like in the instant case, the risk of adhesions and complications would become higher. DW1 also testified that the plaintiff's risk of future treatment, whether medical or surgical, would be significant, and whilst emphasising that the number of such interventions depended on each patient, DW1 stated that general surgical intervention rate could be 15% to 18% and in respect of medical intervention, probably about 20% to 25% with admission and intravenous fluids. The possibility of small intestinal obstruction secondary to adhesions was also stated in the expert reports of Dr Cheong Wai Kit, and Professor MV Kumar (PW3) too in his report stated that adhesions could cause problems like intestinal obstruction even as long as 15 years following surgery. DW1 further gave evidence that a patient may incur a bill of between RM3,000 and RM5,000 for five days of medical treatment even if there was no surgical intervention.

[78] It is noted that none of the experts however could specify the number of times the plaintiff may require medical treatment in the future. I am however satisfied that the plaintiff has established on a balance of

probabilities that the likelihood or risk of the plaintiff requiring non-surgical medical treatment is substantial and it is, as such, reasonable to state that the plaintiff would require non-surgical admission once every four years as submitted by the plaintiff. Accordingly, the sum of RM24,500, as submitted by the plaintiff is awarded in respect of future non-surgical medical treatment whereby RM5,000 per admission is multiplied by 7 (being 75 - 47 years divided by 4 times) and less 30% for contingencies.

Future Medical Surgical Treatment

[79] It is clearly stated in the expert report of Dr Vijeyasingham (DW1) being the second defendant's own expert witness in exh. D3, that "the consequences of multiple laparotomies particularly when the bowel is perforated and there is contamination is that adhesions will form and may lead to episodes of small bowel obstruction that will need hospitalisation and intravenous fluids and in the worst case, further surgery. This is a lifelong risk." DW1 additionally testified that the likelihood of the plaintiff undergoing such surgery to be 15% to 18%, quoting from an article dated 2012 in the *Journal of Visceral Surgery* in exh. D4, which also stated that adhesions develop after 93% to 100% of upper abdominal laparotomies and after 67-93% of lower abdominal laparotomies. As mentioned earlier, DW1 had also testified that the risk of the plaintiff requiring future medical or surgical treatment as significant.

[80] Professor MV Kumar (PW3) testified that the plaintiff may require one of two operations in the near future since the plaintiff had started having pains since the closure of the ileostomy. Furthermore, whilst stating in evidence that it was impossible to give an opinion on the number of surgical interventions in the plaintiff's lifetime because it could range from nothing at all to many more than three interventions, Dr Vijeyasingham (DW1) stated that it was significant and likely that she would require at least medical intervention, if not surgical. DW1 further testified that surgical intervention would cost a minimum of RM15,000 and the maximum cost to be "the sky is the limit".

[81] It should also be noted that Professor MV Kumar (PW3) too testified that in addition to suffering from adhesions, the plaintiff's risk of developing incisional hernias was not insignificant. Even though PW3's expert report refers to 50% of the cases where hernias occur within the first year of surgery, Professor MV Kumar during re-examination agreed that he had seen cases of delayed incisional hernias, quoting a case where it occurred 15 years after the original operation.

[82] I therefore find, given the condition of the plaintiff and the weight of medical evidence that on the balance of probabilities that the likelihood of three future surgeries in the plaintiff's lifetime to be significant, and thus the award of RM52,500 as submitted by the plaintiff, to be a reasonable and fair sum in respect of costs for future surgeries, and satisfied the test established

by *Inas Faiqah*. This is computed by multiplying three surgeries with the cost of single admission of RM25,000 less 30% for contingencies, resulting in the sum of RM52,500.

Pain And Suffering From Future Surgeries

[83] Given the evidence, especially as confirmed by DW1 that the risk profile of someone like the plaintiff is much higher than someone who has not had previous surgery, it is reasonable to state that the possibility of future treatment would likely be accompanied by the risk of complications such that on a balance of probabilities, the chances and likelihood of complications occurring during and as a result of any of the future surgical treatment, to be significant. I therefore consider the sum of RM25,000 proposed by the plaintiff, to be a fair and reasonable award for pain and suffering and the loss of amenities of life that the plaintiff would have to endure during a single future surgery. As such I award the amount of RM52,500 for pain and suffering in relation to future surgeries on the basis of three surgeries and after deducting 30% for contingencies.

Cost Of Nutritional Supplement In The Future

[84] The plaintiff also claimed for the cost of nutritional supplements in the future of RM987,840. This, it appears, arises from the expert report of Professor MV Kumar (PW3) that the plaintiff had suffered weight loss and malabsorption. I note that the small bowels are responsible for absorption of nutrients and in this case those of the plaintiff had been resected. PW3 also stated in his report that the plaintiff will need "diet, vitamin and mineral supplement to maintain her nutritional status". Professor MV Kumar further testified that he would recommend a special whey protein that could be easily assimilated in order to help the plaintiff with her malabsorption problems. The plaintiff, according to PW3, required two tins of whey protein costing RM140 each.

[85] However during cross-examination PW3 said that he would, if the plaintiff was under his care, have referred her to a clinical dietician or a nutritionist to determine how much supplements she exactly needed. Although the plaintiff argued that this shows that the plaintiff indeed require nutritional supplement, in my evaluation, there is no clear evidence that the plaintiff was even malnourished in the first place. In addition, DW1 too testified that there was no obvious malnutrition in any event, and weight loss after surgery is common even without malabsorption and the failure to gain weight is not always a result of malnutrition.

[86] There is also certainly no medical evidence in any of the expert reports including especially from NUH Singapore, where the plaintiff was mostly treated, to support the contention clearly that the plaintiff was malnourished after her third discharge from NUH Singapore or that she would require the special protein drink, not to mention the period during

which this could be necessary, that would satisfy this court on a balance of probabilities that the likelihood of purchase of nutritional supplements (what more of the type suggested by PW3), established by medical evidence, is sufficiently significant to justify an award for the cost of nutritional supplements in the future. In other words, there is plainly insufficient medical or other cogent evidence to support this claim in accordance with the principles established by *Inas Faiqah*. I therefore do not allow any award for this item.

Costs

[87] The plaintiff is claiming a total award for costs of RM170,000 and out of pocket expenses of RM14,747.63. The costs of RM170,000 claimed by the plaintiff is in respect of getting-up fees for liability of RM120,000 and getting-up fee for quantum of RM50,000. It is noted that the second defendant admitted liability on 12 October 2015, being the day the trial on liability (and quantum) was to commence, and I agree that this was when preparatory work towards the giving of evidence in court had already been undertaken. The case of *Lee Bang v. Nadzri* [1965] 1 LNS 82; [1965] 2 MLJ 186 is clear authority for the proposition that a party would still be entitled to the full getting-up fees once a matter is set down for trial, regardless of whether it actually proceeds to trial.

[88] Further, I do not disagree that medical negligence litigation can be a complex area of the law and often involves novel question of law and fact. It is also expensive as the cases submitted by the plaintiff more than amply demonstrate. In *Lee Yaw Loy* referred to earlier, the total getting-up fee awarded against three defendants was RM390,000 where similarly the defendants admitted liability and the case never proceeded to trial. In *Nurul Husna*, the award was for RM200,000 where liability was also admitted and the trial lasted for six days. In two other cases involving negligence against brain damaged infants, namely, *Thivya Ruban Thyagarajan v. Government of Malaysia* (Shah Alam High Court No. MTI-21-170-2005) and *Muhamad Haziq Amsyar & Anor v. Government of Malaysia* (Ipoh High Court No. 22-307-2003), the awards by the taxing master for getting-up fee for liability proceedings where the matter never went to trial was RM100,000, respectively.

[89] I am also mindful that costs awarded may even exceed the value of medical negligence claims, such as in the case of *Kalyani Kunjamboo v. Selangor Medical Centre Sdn Bhd and Dr Zainal Ariffin* (Shah Alam Sessions Court No. 3-52-3519-2001) where the total costs recovered was RM94,943.25 as against the sum of RM34,000 having been awarded as damages.

[90] I further acknowledge the specialised knowledge, time and labour expended by the teams of counsel who are among the few in the legal fraternity who undertake medical negligence litigation, in preparing the claim to be filed and getting the matter ready for trial, as well as familiarising the voluminous documents which run to 1,297 pages in total.

[91] Nevertheless, whilst not discounting the preparatory work already done for both liability and quantum, the second defendant's admission of liability did shorten the time to conclude the case and the court did not have to hear any evidence on liability and the court only had to try the issue of quantum which was plainly less complex than a trial involving examination of both liability and quantum. The trial took place for only two days with a total of seven witnesses having been called to testify.

[92] Accordingly, I consider total getting-up fee for both liability and quantum of RM120,000 to be a fair and reasonable sum given the circumstances I just outlined.

[93] I further note that the plaintiff's claim for a refund of RM14,474.63 as out of pocket expenses, being court fees, photocopying fees, travelling fees and fees paid to experts is challenged by the second defendant on the ground that that this item of cost was not proven at all. I am of the view that the out of pocket expenses must surely have been incurred considering the nature and circumstances of this case, as outlined in Form 117 issued by the plaintiff pursuant to O. 59 r. 7 of the Rules of Court 2012. I therefore direct that this specific item be referred to the Deputy Registrar for determination, on the basis of supporting documentary evidence.

[94] I also note that as stated in the plaintiff's outline of submission in reply, the plaintiff confirms not pursuing the pleaded claim for aggravated damages.

Interest

[95] I agree to the awards for interest as suggested by the plaintiff and not objected to by the second defendant as follows:

(i) interest on special damages awarded at the rate of 4% per annum from the date of the incident (27 September 2013) up to the date of judgment on liability 12 October 2015);

(ii) interest on general damages awarded at the rate 8% per annum from the date of service of the writ (27 February 2015) to the date of judgment on liability (12 October 2015); and

(iii) interest on the judgment sum (including costs) at the rate of 5% per annum from the date of judgment on liability (12 October 2015) to the date of payment.